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Supreme Court of the United States

OCTOBER TERM, 1962.

No. 876

MAX GELLER and ANNE GELLER,

Petitioners,

against

HOLLAND-AMERICA LINE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Supreme Court of the United States

OCTOBER TERM, 1962.

MAX GELLER and ANNE GELLER,

Petitioners,

v.

HOLLAND-AMERICA LINE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 19, 1962 (App. 1).* This judgment affirmed a judgment of the United States District Court for the Southern District of New York (A. 2).*

The action is at law by Max and Anne Geller, for personal injuries received by Anne Geller, while a passenger aboard the respondent's vessel, the SS. *Statendam.*

Opinions Below.

The opinion of the United States Court of Appeals for the Second Circuit is reported in 298 F. 2d 619 (2d Cir. 1961). It may also be found in the petitioners' Appendix (App. 2).

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*"App." refers to the Appendix to this petition. The letter "A" is used to designate "Appellants Appendix" filed in the Court below, being part of the record in the United States District Court.

The opinion of the District Court for the Southern District of New York is reported in 201 F. Supp. 508 (D. C., S. D. N. Y. 1961).

Jurisdiction.

The judgment of the United States Court of Appeals, for the Second Circuit, was entered on January 19, 1962. Rehearing was denied by order dated February 23, 1962 (App. 3). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented.

1. Whether the Court below ignored the question of fact, raised by the petitioners, with respect to whether the time limitation provision was in fact incorporated by the passage ticket.

2. Whether the Court below ignored the fact that the respondent did not establish the absence of issues of material fact on the question of whether the petitioners actually received the ticket from respondent's agent.

3. Whether the collection of the entire passage ticket with appended contract terms, by the respondent, rendered the petitioners so completely ignorant as to their rights, that the validity of those terms which were operative after embarkation, is negated.

Statement.

Background of the Litigation.

The petitioners, residents of Kerhonkson, New York, planned with the Ellenville Travel Agency of Ellenville, New York, prior to December 8, 1958, for a cruise aboard

the respondent's vessel, the SS. *Statendam*. After the initial talks were held, the Levines, owners of the Ellenville Travel Agency, informed the petitioners that the necessary arrangements had been made (A. 12).

The Levines gave the travel papers to the Gellers in an envelope, the outside of which displayed the departure time, date and port of embarkation. This data, on the outside of the envelope, gave the Gellers all the pertinent information needed for embarkation. The Levines had arranged, on previous occasions, a number of trips for the petitioners in similar fashion (A. 14, 25).

This envelope, which the respondent alleges contained the passage tickets, was given by Anne Geller to her husband Max, who did nothing further with it except to present it to the ship's personnel at embarkation (A. 24, 25). The ship's personnel took the envelope and, as respondent admits, kept the entire contents (A. 9). The contents of said envelope were never viewed prior to embarkation by either Anne or Max Geller (A. 15, 25). The tickets were not viewed after embarkation for, as respondent admits, the tickets were entirely collected (A. 9).

At the time Anne Geller took the respondent's cruise, she was three months' pregnant (A. 12). During the cruise, on the night of December 17, 1958, Mrs. Geller's right shoe heel fell into a hole of a rug in the lounge (The Owls Nest Night Club), causing her to fall and topple over a piece of heavy furniture (A. 20).

Mrs. Geller did not, at that time, report the accident. However, about 4:00 A.M. the following morning, she commenced to hemorrhage. The ship's nurse confirmed Mrs. Geller's worst fears, that is, that she was having a miscarriage. The ship's doctor diagnosed Mrs. Geller's hemorrhage as too severe for him to stop (A. 17). He pre-

scribed that Mrs. Geller be taken, as soon as they arrived that morning, to the nearest hospital or else he feared she would not live (A. 19, 27).

Max Geller used the ship's phone to arrange for an ambulance to meet the ship upon arrival at Hoboken, New Jersey, to take Mrs. Geller off. The ambulance took her to West Hudson Hospital where Dr. Philip Grumdfest performed a dilatation and curettage for the removal of Mrs. Geller's three months' old embryo (A. 19, 29). Some time later, a hysterectomy was performed on Mrs. Geller at the Long Island Hospital (A. 22, 23).

Neither the Gellers nor their attorneys at any time possessed a copy of the passage ticket with the appended contract terms. The petitioners' attorneys therefore requested a copy of the ticket from the Ellenville Travel Agency. However, they received a copy without any appended contract terms (A. 32). Petitioners' attorneys were unsuccessful in their attempt to secure a copy of said ticket from respondent's attorneys prior to suit. The petitioners first saw a purported copy of their passage ticket at their examination before trial (A. 14). Neither Mrs. Geller (A. 14) nor Mr. Geller could identify it as their own (A. 25). Both Max and Anne Geller, under oath, have sworn that they have never seen the tickets either prior to or after embarkation (A. 6).

District Court Proceeding.

The respondent, after completing its discovery, moved in the District Court for the Southern District of New York, for summary judgment on the basis that:

1. The passage ticket provisions limited the commencement of suit to one year from the date of the accident; and

2. The petitioners failed to sue within said time as set forth in their ticket.

The District Court granted the respondent a summary judgment. A summary of the Court's findings, as stated in its opinion, is as follows:

There is no dispute that Anne Geller received the ticket for the cruise from Levine's Ellenville Travel Agency at least one week before the cruise began (A. 2). Paragraph 12 of the ticket (A. 34) contains a provision which limited a suit for personal injury to one year from the date of the accident (A. 3). The Court further held:

> "It is clear that in this case the one year limitation was part of the Passage Contract" (A. 4).

Thus, the Court concluded the Gellers were bound to sue within the year limitation as set forth in the ticket, and having failed to do so, were thereafter barred.

The Decision of the Court of Appeals.

The Second Circuit affirmed the decision of the District Court holding that there were no genuine issues of fact in dispute. (App. 2). The Court of Appeals concluded, in its opinion, the following:

> 1. The passage ticket contained a provision that suit must be brought for injuries sustained during the voyage, within one year from the date of the injury. (App. 2)
>
> 2. On the basis of the affidavit of L. Levine, owner of the Ellenville Travel Service, the Gellers had the tickets in their possession prior to the voyage. (App. 2)
>
> 3. The settled law that a passenger is bound by the terms of the passage ticket, including the limitation provision, is not affected by the fact that the entire ticket was collected at embarkation. (App. 2)

Reasons for Granting the Writ.

Certiorari should be granted in this case in order for this Court to determine for the first time whether the collecting of the entire ticket with appended terms at embarkation by respondent, rendering the petitioners completely ignorant as to their rights, negated the validity of those ticket terms which allegedly went into effect after embarkation.

It is respectfully submitted that this question of federal maritime law is of great importance to the business of steamship passenger service and should be settled by this Court.

I.

The decision below overlooked the genuine issue of fact, raised by the petitioners, with respect to whether the time limitation provision was in fact incorporated by the passage ticket.

The respondent received summary judgment against the petitioners by Judge Cashin on May 15, 1961 (A. 2). Judge Cashin found that there were no genuine issues of fact in dispute. However, that Court completely overlooked the question of fact, raised by petitioners, of whether the time limitation provision was incorporated into the passage ticket. The petitioners, in their appeal, again raised this genuine issue of fact but the Court below in its decision did not pass upon it (App. 2).

The petitioners testified that they did not see the passage ticket or any of the alleged contract provisions appended thereto. However, apart from this issue, the petitioners raised an issue of fact with reference to respond-

ent's Exhibit No. 1 (A. 34), the purported copy of the petitioners' ticket. It is petitioners' contention that the time limitation provision, No. 12 on the continued overleaf, was not incorporated by the passage ticket which the petitioners are allegedly bound by. This ticket the Court will note contains a clause on the right side of the face of the ticket above the presumable signature of the respondent's agent which purports to incorporate the maze of fine print on both sides of respondent's Exhibit No. 1. This clause is lost among myriads of words and superimposed sketches of vessels. It is further obscured by the superimposed printing stamped or typed over it upside down.

It is respectfully submitted that the format of said ticket and the obscuring of the attempted incorporating clause, creates a serious issue of fact, namely, whether the time limitation provision was incorporated into the formal contract box on the right side of the ticket.

The case of *Furr* v. *Societa Ital. Transp. Marit., Genoa, Italy*, 162 F. Supp. 645 (Dist. Ct. S. D. N. Y. 1958), is quite in point wherein it was held:

> "An examination of the cases reveals that in those where the disputed provision was clearly, in large type, and in an obvious place referred to in the ticket the passenger was generally held to its terms; *but where the type was small and the attention of the passenger was not, by virtue of the 'physical format' of the ticket, likely to be focused on the disputed provisions, the converse is true, and the conditions were held not to be incorporated.*" [Emphasis added]

The case of *Mulvihill* v. *Furness, Withy & Co.*, 136 F. Supp. 201 (Dist. Ct., S. D. N. Y., 1955) affirms petitioners' contention that this question is an issue of fact which can only be resolved by a trial. That case held:

> "Whether the provisions of the ticket constitute mere notice or whether they are formally incorporated into the contract of passage is, therefore, *a preliminary issue of fact vital to the resolution of the question of their binding character as a matter of law.*" [Emphasis added]

The District Court in no way attempted to deal with this "preliminary issue of fact". Judge Cashin merely stated the unsupported conclusion that "It is clear that in this case the one year limitation was part of the Passage Contract" (A. 4). This statement was in no way aided by the respondent, which did not attempt to refute the contention of the petitioners that even if they had tickets in their possession, *the time limitation was not incorporated into the formal contract box of said passage ticket.*

The Court below, disregarding that this question of fact remained unanswered by the respondent and ignored by the District Court, states:

> "Since the limitation provision was incorporated by reference in the body of the contract, appellants were bound to institute their action within one year" (App. 2).

Thus, if there were no other facts in dispute but this one, the only proper way to resolve it is by a trial. Therefore the Court of Appeals erred in affirming the District Court's granting of summary judgment.

II.

The Court of Appeals ignored the fact that the respondent did not establish the absence of issues of material fact on the question of whether the petitioners actually received the ticket from respondent's agent.

The respondent, as movant for the motion of summary judgment, has the burden of establishing the absence of material issues of fact. See *Afran Transport Company* v. *National Maritime Union*, 177 F. Supp. 610 (Dist. Ct. S. D. N. Y. 1959).

The respondent in order to establish beyond doubt that the petitioners were in possession of the passage tickets containing the time limitation clause, proffered the affidavit of their travel agent, Lawrence Levine of the Ellenville Travel Agency (A. 36). This affidavit, the Court will note, is *rendered merely on information and belief*. Further, it states that the tickets were delivered to the petitioners *as per "the normal modus operandi"* of the offices of Ellenville Travel Service (A. 36).

It is respectfully submitted that this affidavit could in no way settle the question of whether the Gellers had, in fact, received the passage tickets. Rather, it serves as a vehicle of introducing further serious issues of fact: What was the *"normal modus operandi"* of the respondent's agent? There is yet to be presented an iota of proof pertaining to the *"modus operandi"* of said agent. Further this affidavit, which is the only attempt by the respondent to refute the sworn testimony of the Gellers that they did not see nor possess the passage tickets, is itself predicated upon an issue of fact, that is, the credibility of Lawrence Levine. This contention is clearly borne out by the case of *Colby* v. *Klune*, 178 F. 2d 872 (2d Cir. 1949), which held:

> "We have in this case one more regrettable instance of an effort to save time by an improper revers'on to 'trial by affidavit,' improper because there is involved an issue of fact, turning on credibility. * * * *When, then, as here, the ascertainment (as near as may be) of the facts of a case turns on credibility, a triable issue of fact exists, and the granting of a summary judgment is error.*" (Emphasis added.)

The Court below cited the case of *Dyer* v. *MacDougall*, 2d Cir., 1952, 201 F. 2d 265 (App. 2). That case held that the plaintiff failed to create genuine issues of fact *only after the defendant, on its motion for summary judgment, succeeded in proving that the plaintiff would not have enough evidence to go to the jury.* This is not the situation in the case before this Court. The respondent's ineffectual attempt to establish the absence of an issue of fact, on the question of issuance of the passage ticket, merely raised further issues of fact.

Thus, the question of respondent's agent's credibility, and, ultimately, the question of whether the plaintiffs actually received the tickets are material issues of fact which can only be resolved by trial. Further, the petitioners, as the non-moving parties in the motion for summary judgment, were not given the benefit by either the District Court or the Court below, of having all doubts on these issues of fact resolved in their favor. That they were entitled to this benefit is clearly illustrated by the case of *Walling* v. *Fairmont Creamery Co.*, 139 F. 2d 318 (8th Cir. 1943), which held:

> "On a motion for a summary judgment the burden of establishing the nonexistence of any genuine issue of fact is upon the moving party, all doubts are resolved against him, and his supporting affidavits and depositions if any, are carefully scrutinized by the Court."

It is respectfully submitted, in light of the aforementioned, that the respondent at no time sustained the burden of proving the absence of issues of material fact pertaining to the question of whether the petitioners actually received the passage ticket from respondent's agent. Therefore the decisions of the District Court and the Court below, having ignored this vital factor, are in error.

III.

The collection of the entire ticket with appended terms at embarkation by respondent, rendering the petitioners ignorant as to their rights, negated the validity of those ticket terms which went into effect after embarkation.

The passage ticket or contract of carriage, which the respondent allegedly issued to the petitioners, is completely unlike the land contract because of an important missing factor, that is, *freedom to contract.*

Judge Jerome N. Frank of the Second Circuit, stated in *Siegelman v. Cunard White Star*, 221 F. 2d 189, 1955 A. M. C. 1691, (2d Cir. 1955):

> "I call attention to another factor which, while unnecessary to my conclusion, I think supports it:
>
> The ticket is what has been called a 'contract of adhesion' or a 'take-it-or-leave-it' contract. In such a standardized or mass-production agreement, with one-sided control of its terms, when the one party has no real bargaining power, the usual contract rules, based on the idea of 'freedom of contract,' cannot be applied rationally. For such a contract is 'sold not bought.' The one party dictates its provisions; the other has no more choice in fixing terms than he has about the weather. * * *"

Thus, we are dealing with a peculiar type of contract which lacks the element of *freedom of contract*, and where the terms are dictated *on a take-it-or-leave-it* basis. To this peculiar type of contract we must include an additional factor, that is, respondent's practice of *taking the passage ticket and appended terms away from the passenger, leaving said passenger without a hint of what his rights are.*

The passage ticket allegedly issued to the petitioners by the respondent contains some twenty-five (25) fine printed provisions, each dealing with a different subject (A. 34). The Court will note that some of these provisions apply after embarkation, while others apply before. An example of this latter category is provision No. 15, which grants the respondent the right to substitute vessels or cancel the cruise (A. 34). The most pointed example of a provision which applies after embarkation, is provision No. 12, upon which the respondent was granted a summary judgment; that is, the provision requiring suit to be brought no later than one year from the date of injury.

The petitioners, if they had the tickets in the envelope allegedly given to them by the Levines, could of course refer to the ticket with reference to those provisions which apply prior to embarkation. However, at embarkation, the respondent's ship personnel collected the entire passage ticket with appended terms, leaving the petitioners with no copy of the contract terms (A. 9). Therefore, it is evident that the petitioners had no way of ascertaining what their rights were, or indeed if they had any rights at all regarding that period of time after embarkation.

It is respectfully submitted that the collection of the entire passage ticket at embarkation was completely detrimental to the petitioners in that they were purposely made unaware of the provision on which the respondent has relied on. It is the contention of the petitioners that this

practice is so inequitable that the validity of the one year time bar provisions should be negated. This contention is eloquently buttressed by the holding of Judge Learned Hand in the case of *Bellocchio v. Italia Flotte Riunite Cosulich Line Lloyd Sabaudo Navigazione Generale*, 84 F. 2d 975 (2d Cir., 1936).

In that case, the plaintiff passenger was injured aboard the defendant's vessel. The plaintiff failed to comply with the provision on the back of the ticket requiring notice of the claim to be made within thirty days after the ship's arrival. The District Court dismissed the plaintiff's case on the basis of his failure to comply with the time limitation provision on said ticket. In that case, as here, the entire ticket was collected at embarkation. Judge Hand, in reversing the judgment below held:

> "The case was not dismissed on this issue but because of a provision on the back of the ticket requiring an injured passenger to give written notice of any claim for injuries within thirty days after the ship's arrival. No such notice was given. *Such limitations are lawful and when the time given is, as here, thirty days, they would be reasonable, except for the practice of taking up the ticket early in the trip and leaving the passenger in ignorance of the limitation at the only time when it becomes important. On its face such a practice appears so unfair as to make doubtful the validity of the limitation itself;* * * *" (Emphasis added.)

A further pronouncement of the law in this area is the case of *McCaffrey v. The Cunard Steamship Company*, 139 F. Supp. 472 (S. D. N. Y. 1955). The Court, in denying a similar motion for summary judgment, commented directly on this practice of collecting the entire passenger ticket prior to embarkation. The Court held:

> "Upon the facts of the present case, the issue must be left for the jury. * * * *The failure to leave the passenger with her copy of the alleged contract is all the more significant here because when the passenger last had an opportunity to read the conditions of the ticket her interest in a claim for damages was purely academic. After her accident had in fact occurred neither she nor her lawyers had a copy of the ticket to peruse,* * * defendant, if it intended to rely upon the conditions on the back of the contract, was at least required to disclose again to the plaintiff the terms of the condition on the back of her ticket, which she had already surrendered." (Emphasis added.)

The above decisions clearly demonstrate that the respondent's practice of collecting the entire ticket, so as to render the petitioners ignorant as to their rights, is so inequitable a practice that the validity of the time provision on the back of said ticket must be negated.

The Court below, in its opinion, cites *Foster* v. *Cunard White Star, Ltd.*, 2nd Cir. 1941, 121 F. 2d 12, as authority for the proposition that the collection of the entire ticket at embarkation by the respondent in no way affected the settled law that passengers are bound by the time provision contained in their contract of carriage (App. 2). It is respectfully submitted that this case in no way alters the law as espoused by Judge Hand in *Bellocchio* v. *Italia Flotte Riunite Cosulich Line Lloyd Sabaudo Navigazione Generale* (*supra*). Indeed, it is silent on the very proposition the Court below held it was authority for.

This practice of the respondent of collecting the entire ticket at embarkation and leaving the passenger without a copy of the passage provision, effects thousands of passengers each year. There are approximately 900 passengers leaving for Europe on the *S.S. Statendam* every three

weeks. During the cruise season, December through March, the same approximate amount board the S.S. *Statendam* about every eight to fifteen days. As each and every passenger walks up the gangway, at embarkation, he is relieved of his ticket and appended contract terms. But more significantly, he is enticed into a complete state of ignorance of what, if any, rights he has under the passage contract. Thus, not only does he enter into a contract without any bargaining power—a contract on a take-it-or-leave-it basis, but he is required to memorize each of the twenty five (25) fine print provisions prior to embarkation, in order to remember what rights he may have under the contract.

The propriety of this practice of respondent has national importance on steamship passenger service. Thus, if this Court permits the respondent to continue the practices of purposely rendering its passengers ignorant of their rights, other steamship companies may follow suit and institute this procedure. Companies which now give copies of the ticket contract to its passengers, (most, if not all, American steamship companies now do) will hereafter adopt the tactic of Holland America Line, in order to obtain an added method of insulation against liability, irrespective of how unconscionable or inequitable this procedure may be.

Petitioners therefore respectfully request this Court to determine for the first time, this question of national significance in the maritime industry, that is, whether respondent's practice of collecting the entire ticket, prior to embarkation, is so inequitable that it negated the validity of the terms which went into effect after embarkation.

Conclusion.

For the reasons stated, it is respectfully submitted that the petition for the right of certiorari be granted.

Respectfully submitted,

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Elli Ellis,
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Judgment of the United States Court of Appeals for the Second Circuit, Dated January 19, 1962.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York on the 19th day of January, one thousand nine hundred and sixty-two.

Present: HON. LEONARD P. MOORE
HON. J. JOSEPH SMITH
HON. PAUL R. HAYS
Circuit Judges.

MAX GELLER and ANNE GELLER,
Plaintiffs-Appellants,

v.

HOLLAND AMERICAN LINE,
Defendant-Appellee.

Filed February 28, 1962

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

This cause came on to be heard on the transcript of record from the United States District Court, for the Southern District of New York, and was argued by counsel.

On consideration thereof, it is now hereby ORDERED, ADJUDGED AND DECREED that the judgment of said District Court be and it hereby is affirmed with costs to the appellee.

A. DANIEL FUSARO
Clerk

Opinion of the United States Court of Appeals for the Second Circuit, Dated January 19, 1962.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 83—September Term, 1961.

(Argued November 17, 1961 Decided January 19, 1962.)

Docket No. 27077

MAX GELLER and ANNE GELLER,
Plaintiffs-Appellants,

against

HOLLAND-AMERICA LINE,
Defendant-Appellee.

Before:

MOORE, SMITH and HAYS,
Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, John M. Cashin, Judge, entered on an order granting defendant-appellee's motion for summary judgment.

Affirmed.

ELI ELLIS, New York, N. Y. (HILL, BETTS, YAMAOKA, FREEHILL & LONGCOPE, J. P. CATUZZI, of counsel, New York, N. Y., on the brief), for plaintiffs-appellants.

JOHN J. CROWLEY, New York, N. Y. (BURLINGHAM, HUPPER & KENNEDY, FRANCIS I. FALLON, of counsel, New York, N. Y., on the brief), for defendant-appellee.

Opinion of the United States Court of Appeals for the Second Circuit, Dated January 19, 1962.

PER CURIAM:

Appellants, plaintiffs below, appeal from a decision of the district court granting summary judgment for appellee. This action which is predicated upon personal injuries sustained by Anne Geller on December 17, 1958, while a passenger on appellee's vessel, The SS. *Statendam*, was commenced on June 23, 1960. Since the Cruise Passage Contract (the Contract) between appellants and appellee contained a provison that suit for injuries sustained during the voyage must be brought within one year from the date of the injury, the district court held that appellants' suit was barred because it was not brought within the one-year limitation period.

Appellants contend that they are not bound by the limitation provision of the Contract unless it is shown that they had actual knowledge of its terms and that the collection of the ticket at embarkation negated appellee's right to enforce this provison. However, it is the settled law in this circuit that passengers will be bound by such a provison in the contract of carriage, if the provision is incorporated, at least by reference, in the body of the contract. *Foster* v. *Cunard White Star, Ltd.*, 2 Cir., 1941, 121 F. 2d 12; *Baron* v. *Compagnie Generale Transatlantique*, 2 Cir., 1939, 108 F. 2d 21; see also *Siegelman* v. *Cunard White Star, Ltd.*, 2d Cir., 1955, 221 F. 2d 189; *Schiebel* v. *Aguilines, Inc.*, 2d Cir. 1946, 156 F. 2d 636; *The Kungsholm*, 2d Cir., 1936, 86 F. 2d 703. This rule applies even though the ticket containing the contract is collected at the time of embarkation. See *Foster* v. *Cunard White Star, Ltd.*, *supra*. Since the limitation provison was incorporated by reference in the body of the contract, appellants were bound to institute their action within one year of the date of the injury and their failure to do so bars this suit.

The only other question presented by this appeal is whether there was a genuine issue of fact concerning the

receipt of the Contract by appellants which requires a trial. Appellee submitted an affidavit by Lawrence Levine, owner of the Ellenville Travel Service, in which he stated that he delivered the Contract to appellants. Appellants did not contradict this statement in any manner, but merely asserted that, since they had not opened the envelope that they received from Levine, they did not know whether or not they had received the Contract. This assertion by appellants was not sufficient to create a genuine issue of fact and, therefore, the motion for summary judgment was properly granted. E.g., *Dyer* v. *MacDougall*, 2d Cir., 1952, 201 F. 2d 265; *Reynolds* v. *Maples*, 5th Cir., 1954, 214 F. 2d 395; *Magee* v. *The Coca-Cola Co.*, 7th Cir., 1956, 232 F. 2d 596.

Affirmed.

Order of the United States Court of Appeals, for the Second Circuit, Dated February 23, 1962, Denying the Petition for Rehearing.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

MAX GELLER and ANNE GELLER,
Plaintiffs-Appellants,

against

HOLLAND-AMERICA LINE,
Defendant-Appellee.

Before:

MOORE, SMITH and HAYS, C. JJ.

Petition for Rehearing.

Motion for rehearing denied.

LPM
JJS
PRH
U. S C. JJ.

February 23, 1962.

Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 870

MAX GELLER and ANNE GELLER,

Petitioners,

—against—

HOLLAND-AMERICA LINE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

EUGENE UNDERWOOD
Counsel for Respondent

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In the

Supreme Court of the United States

October Term, 1961

No. 876

Max Geller and Anne Geller,

Petitioners,

—against—

Holland-America Line,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

No question of general importance is involved, or was decided below.

Petitioners admittedly purchased their Passage Contract from Levine's Ellenville Travel Service and possessed it for at least a week and "perhaps two or three weeks" prior to embarkation (R 6, 7, 8, 9).* Max Geller *knew* that the envelope he received contained the Passage Contract and he handed it to respondent's representative on boarding the ship (R 10, 11). Anne Geller *looked at* the Passage Contract either at the agency or at home and three times identified it at her deposition, although she also said "I see it is a ticket, I realize that must have been the ticket we had. However, to say that I remember this ticket, no" (R 7, 8, 9).

* Unless otherwise designated, numbers in parentheses with prefix "R" refer to respondent's appendix in the Court of Appeals and numbers with prefix "A" to petitioners' appendix in that Court.

Lawrence Levine, owner of the Ellenville agency and known by Max Geller "for the last thirty-six years" (R 11), by an affidavit which is not disputed, stated that he delivered the Passage Contract to petitioners on October 28, 1961 (R 16). The Contract itself, and the stub which petitioners received from Levine on request, confirm this date (A 32, 34).

In short, it is undisputed that the Passage Contract on which respondent relied below was issued to, used by and in petitioners' possession for six weeks before embarkation and that suit was not commenced until over 18 months from the date of the alleged accident.

On respondent's motion for summary judgment petitioners did not deny that the Passage Contract on which respondent relied (A 34) was the one they bought from Levine and surrendered at embarkation. *Neither Max nor Anne Geller ever submitted affidavits in opposition to this motion.* The Courts below held only that petitioners raised no genuine issue of fact as to their receipt and use of this Passage Contract and, on familiar law, that the one year suit clause was valid inasmuch as it was incorporated in the body of the Contract.

Petitioners' "reasons" for granting the writ are disingenuous. It was not "the collecting of the entire ticket with appended terms at embarkation" that resulted in "rendering the petitioners completely ignorant as to their rights." If they were ignorant, their ignorance was self imposed inasmuch as it was established by respondent's affidavits, and not denied by petitioners, that they had possession of the Passage Contract for some six weeks before embarkation.

Answering Petitioners' Point I

The prevailing rule was established by this Court in *The Majestic*, 166 U. S. 375, viz.: If conditions or limitations are printed in the body of the contract, or are referred to in the body of the contract and thus made a part of it, they are valid. As was said in *Baron v. Compagnie Generale Transatlantique*, 2 Cir., 108 F. 2d 21 (pp. 22, 23):

> "The distinction laid down in The Majestic, 166 U. S. 375, is between provisions in a steamship ticket which amount only to notices and *provisions which are formally incorporated into the contract of passage.* Provisions that are mere notices are not operative unless actually brought to the passenger's attention. Baer v. North German Lloyd, 2 Cir., 69 F. 2d 88; Maiburun v. Hamburg-American S.S. Co., 2 Cir., 77 F. 2d 304; Bellocchio v. Italia Flotte, 2 Cir., 84 F. 2d 975; The Kungsholm, 2 Cir., 86 F. 2d 703. On the other hand, *provisions that appear on the ticket as part of the contract of passage embodied in the ticket are binding regardless of whether they are read by the passenger, provided they are not unlawful in content.* The Leviathan, 2 Cir., 72 F. 2d 286; Murray v. Cunard S.S. Co., 235 N. Y. 162" (italics ours).

In *Foster v. Cunard White Star, Ltd.*, 2 Cir., 121 F. 2d 12, indistinguishable from the case at bar, the Court in affirming summary judgment for the carrier said:

> "For we find a direct reference in the box on the face of the ticket to the terms and conditions of the contract, that these were carried on the ticket's face and back into the box itself, so that the final condition is actually found there, and the signature of the carrier

appears immediately thereafter. Thus the limitation is directly made a part of the contract of carriage" (p. 13).

The cases are in accord, *Murray* v. *Cunard S.S. Co.*, 235 N. Y. 162; *Siegelman* v. *Cunard White Star, Ltd.*, 2 Cir., 221 F. 2d 189; *Baron* v. *Compagnie Generale Transatlantique, supra.* There are none *contra.*

Answering Petitioners' Point II

The Court of Appeals said:

"Appellee submitted an affidavit by Lawrence Levine, owner of the Ellenville Travel Service, in which he stated that he delivered the Contract to appellants. *Appellants did not contradict this statement in any manner*, but merely asserted that, since they had not opened the envelope *that they received from Levine*, they did not know whether or not they received the Contract. This assertion by appellants was not sufficient to create a genuine issue of fact and, therefore, the motion for summary judgment was properly granted" (Petitioners' Appendix p. 4; italics ours).

On such facts the absence of material issues of fact was established and the motion was properly granted. *Dyer* v. *MacDougall*, 201 F. 2d 265; *Reynolds* v. *Maples*, 214 F. 2d 395; *Magee* v. *The Coca-Cola Co.*, 232 F. 2d 596; *Baer* v. *North German Lloyd*, 69 F. 2d 88, 89; *Lewitsky* v. *Matson Navigation Company*, 134 F. Supp. 441.

Answering Petitioners' Point III

In their attempt to escape the consequences of their own alleged failure to read the Passage Contract, petitioners ascribe sinister motives to respondent's compliance with the customary practice of collecting the ticket on embarkation. They do not refer, however, to the firmly established rule that *the possession of the ticket*, as here, charged them with notice of its provisions as a matter of law. In *Foster v. Cunard White Star, Ltd.*, 2 Cir., 121 F. 2d 12, the Court held:

> "Plaintiff is charged with notice of the limitation, since her brother, who purchased the ticket for her (as well as for himself, as he was also a passenger), *had it in his possession for some 17 days before the voyage commenced*" (p. 13; italics ours).

See also *Siegelman v. Cunard White Star, Ltd., supra* (10 or 11 days); *Rogers v. Furness, Withy & Co.*, 103 F. Supp. 314 (19 days); *Mauer v. Zim Israel Nav. Co.*, 177 F. Supp. 69 (about 2 weeks).

In view of petitioners' ample opportunity to read the ticket, the words of Judge Cardozo in *Marran v. Cunard Steamship Co.*, 235 N. Y. 162, 166-7, are particularly apt:

> "The plaintiff is not helped by his surrender of the ticket when he went aboard the ship, after he had then held it several days with ample time to read it. A contract valid and reasonable in its inception does not become invalid and unreasonable thereafter * * *. If some aid of memory is required, his business is to make for himself a note of the conditions, or to procure from the carrier a copy, which doubtless would be given for the asking. There is little ground for the belief that this plaintiff would have examined his ticket within

the period of forty days, though he had taken it ashore on the termination of the voyage. * * * He had abundant opportunity both on the ship and later to inquire about the terms of carriage, if he supposed them to be important. We should indulge in the merest speculation if we were to say that the surrender of the ticket was the cause of the omission of the notice. Whether it was or not, his contract remained the same."

Petitioners' Citations

Petitioners' references to the cases are misleading. Their quote from *Farr* (Petition, p. 7), stated by them to be what was *held*, is characterized by that very Court in the next sentence as, "* * * not the stated rule * * *". Summary judgment was granted to the carrier in *Farr*.

In *Mulvihill* (pp. 7, 8) the Court did not *hold*, as petitioners state, that a triable issue of fact was present but granted summary judgment to the carrier.

In *Bellocchio* (p. 13), immediately following the quote which petitioners state is a "holding", the Court said "* * * but since there may be excuses for it which do not appear, we leave the question open."

In *McCaffrey* (pp. 13, 14), as in *Bellocchio*, judgment was denied because the limitation provision was *not* incorporated into the contract of carriage.

Petitioners fail to point out that the quote from *Siegel* (p. 11) comes from the dissent.

Petitioners' Other Misconceptions

Compare petitioners' statement (pet. 4, 9) that "Both Max and Anne Geller, under oath, have sworn that they have never seen the tickets either prior to or after embarkation" and "[i]gnore the sworn testimony of the Gellers that they did not see nor possess the passage tickets [] with their actual testimony (R 7-11):

ANNE GELLER

"A. I think I picked up the tickets. I am not quite certain if I did or my husband did" (R 7).

[]

"Q. Who would most likely have picked up those tickets, or were they delivered to you? A. No; it would be either my self or my husband" (R 7).

[]

"Q. My question to you is: Do you recall ever taking a look at the ticket to see if you have the right vessel? A. Yes, we did. I remember looking at them, where we had to go to leave. We were not quite sure. Then we realized it was Hoboken and what time the ship was sailing.

Q. Where did you look at the ticket, in the Levine Agency in Ellenville? A. Either in the Levine Agency or at home" (R 7).

[]

"Q. You checked the ticket in order to make sure when you were going to leave and from what port in New York; is that right? A. That's right.

Q. From what port did you find that you were going to embark? A. Hoboken" (R 7).

"Q. You found that out by looking at the ticket? A.

Q. You do recall that clearly, do you not? A. Definitely.

Q. The only thing you do not quite recall is whether you were at home in the hotel when you checked the ticket or whether you were in the Levine Agency in Ellenville? A. That's right" (R 8).

* * * * * *

"Q. What was given to either you or your husband by the Levine Agency in Ellenville in return for the check? A. An envelope containing tickets" (R 8).

* * * * * *

"Q. How long in advance of your departure on this boat from Hoboken did you have the ticket? A. Probably two weeks or perhaps a week.

Q. Not any longer? A. Perhaps two weeks or three weeks" (R 8).

* * * * * *

"Q. But in any event, at least two weeks before your New York departure you knew you had the ticket and it was in your possession? A. Yes" (R 8).

* * * * * *

"Q. There did come a time before you sailed on the STATENDAM, before you left home in Kerhonkson, that you knew you had the ticket? A. That's right.

Q. That is the ticket I am referring to here, this Defendant's Exhibit 1; is that right? A. That's right" (R 8, 9).

* * * * * *

"Q. So that at least one week before December 10th, when you departed from Hoboken, you or your husband knew that you had this ticket at home in your possession. A. That's right" (R 9).

* * * * * *

"Q. You are sure that ticket, that Defendant's Exhibit 1 for identification, was in the possession of you and your husband at least a week before you sailed, is that correct? A. That's right" (R 9).

. . . . . .

MAX GELLER

"Q. Do you remember having a ticket to go on the ship? A. Yes.

Q. How did you find that out? A. I had them in an envelope" (R 10).

. . . . . .

"Q. You do recall just saying a couple of minutes ago or perhaps less that she handed you the tickets. A. I knew I had the tickets. When we went on the boat I was the one that gave them the tickets" (R 10).

. . . . . .

"A. I know there were tickets there.

Q. How do you know that? A. I know the people I deal with" (R 11).

. . . . . .

"A. I was sure the tickets were in there.

Q. Why were you sure, merely because at the moment you could rely on them at the agency? A. Yes. I know the people for the last thirty-six years" (R 11).

Although petitioners say that Levine's affidavit, the Court will note, is *made upon information and belief* (p. 9), the fact is that only a part of his affidavit was "on information and belief", viz., that part which relates to the undisputed fact that he delivered the passage contract to petitioners *in person* rather than by certified mail (R 16).

Petitioners' attempts to generate an emotional appeal contrast unfavorably with their failure to inform the court that the Passage Contracts were delivered to them several weeks before embarkation, and their failure to inform the court that within three months of the date of the alleged accident respondent put their proctors on notice that respondent would rely on the Passage Contract defenses (R 20).

It is significant that petitioners' experienced admiralty proctors never asked respondent for a copy of the Passage Contract (R 21-22) although they were employed by petitioners within three months of the alleged accident and were advised by respondent that reliance would be placed on the Passage Contract defenses. It is a fair inference that the Passage Contract terms were known; otherwise a copy would have been asked for. Note the identity of the attorneys who represented the steamship company in the passage contract case of *Moore* v. *American Scantic Line*, 2 Cir., 121 F. 2d 767.

Moreover, as regards the collection of the entire ticket, Mrs. Geller testified that, when he handed it to respondent's representative on boarding the ship on December 10, 1958, "they gave me back something", yet, as of September 19, 1960, he testified he *had never looked to see what it was* that was handed back to him (Record 123, 125). He can hardly be heard to complain that this envelope did not contain a copy of his ticket.

This Court's attention is not merited and the petition should be denied.

Respectfully submitted,

EUGENE UNDERWOOD,
Counsel for Respondent

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